THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

ANNA BARBARA HANTZ MARCONI

Case No. 217-2024-CR-01167

STATE'S MOTION TO QUASH SUBPOENA (AG FORMELLA)

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, and moves this Honorable Court to quash the subpoena served on AG Formella seeking his testimony in the trial on this matter. In support thereof, the State represents as follows:

1. On Tuesday, July 22, 2025, counsel for Defendant contacted the State to seek the State's assent to a continuance of the September trial date set for this matter. Among the reasons counsel for Defendant cited for the need for a continuance was a number of pending motions for the Court to rule on and possible need for further litigation of motions. That same day, the State informed counsel for Defendant that given the state of the case at that time, including the motions pending before the Court and standard matters to be resolved by the Court before trial, the State did not believe that a continuance of the trial date in this matter was necessary and would not assent to a continuance. The State suggested the parties ask the Court to schedule a status conference at the Court's earliest convenience to discuss pending matters and timeframes for the case to proceed to trial in September. On Wednesday, July 23, 2025, counsel for Defendant informed the State that in the absence of an agreement to continue the September trial date, counsel for Defendant did not believe a status conference would be beneficial.

2. On Thursday, July 24, 2025, the parties received a Notice of Hearing from the Court for a motions hearing on August 8, 2025. Later that day, the State received a request from counsel for Defendant to accept service of a subpoena seeking AG Formella's testimony at trial in this matter, which counsel for Defendant noted would likely draw this Motion to Quash (and the subsequent litigation inherent in the filing of this Motion).

AG Formella Is Not a Necessary Witness; Testimony Would Be Inadmissible

3. Litigation surrounding the fact that AG Formella is not a necessary witness for trial is already before this Court in the context of Defendant's Renewed and Supplemented Motion to Disqualify the Attorney General's Office and to Dismiss the Indictments ("Renewed Motion") and the State's objection thereto ("Objection to Renewed Motion"). *See* Objection to Renewed Motion at ¶¶ 10-17. In the interest of judicial economy, the State incorporates by reference the arguments contained in the Objection to Renewed Motion, but will also address key points for the pending Motion to Quash. The State further notes that if this Court were to agree with the arguments by the State therein and rule that AG Formella is not a necessary witness (and thus does not have a conflict of interest) in denying Defendant's Renewed Motion, then this Motion to Quash should be granted under the doctrine of *res judicata*. *See, e.g.*, *Gray v. Kelly*, 161 N.H. 160, 164 (2010) (quotation omitted) ("Res judicata, or 'claim preclusion,' is a broader remedy [than collateral estoppel] and bars the relitigation of any issue that was, or might have been, raised in respect to the subject matter of the prior litigation.").

4. This Court has already considered and rejected this argument in its Order on the First Motion. *See* Order on the First Motion at *14. As this Court noted in denying the First Motion, the unique status of the attorney general, serving as civil counsel to the executive branch (including the governor) and the State's chief prosecutor (*see, e.g.*, id. at *4), does not create a

conflict of interest. Id. at *10. Accordingly, this Court noted that AG Formella speaking to Sununu and Ogden in his role as civil counsel and hearing information that is relevant to his duties as a prosecutor is not a reason to disqualify AG Formella and/or the New Hampshire Department of Justice. Id. at * 3-10 (discussing the dual roles of the attorney general and finding no conflict of interest generally or in this case). While the Court found Defendant's allegations to be "speculative" that AG Formella or other AAGs could hypothetically become witnesses "if the Governor approached them with information regarding his conversation with Defendant," the Court further noted that even such a scenario would not make AG Formella a necessary witness or create a conflict of interest:

> In addition, the Court does not understand how such a hypothetical situation [of the Governor approaching AG Formella with information about his conversation with Defendant] differs from the normal course. To disqualify the AG's office in such a situation would seem to require its disqualification any time the AG's office receives a tip regarding criminal activity, chooses to investigate, and ultimately finds probable cause to indict and prosecute. The Court does not understand how this process differs from the statutory duty of the AG's office to conduct criminal investigations and prosecutions. See RSA 21-M:2.

Id.

5. The State would begin by noting that any communications between AG Formella and Sununu or Ogden *not* related to the matters in this case would be barred by N.H. R. Prof. Conduct 1.6 (Confidentiality of Information). *See* id. at *4 ("As Attorney General, AG Formella also has statutorily imposed duties . . . to represent the executive branch in civil matters.") (citing RSA 7:6).

6. "A lawyer is a 'necessary' witness if 'his or her testimony is relevant, material and unobtainable elsewhere." *State v. Van Dyck*, 149 N.H. 604, 606 (2003). "If the evidence sought to be elicited from the attorney-witness can be produced in some other effective way, it may be that the attorney is not necessary as a witness. If the lawyer's testimony is merely

cumulative, or quite peripheral . . . ordinarily the lawyer is not a necessary witness." *Id.* (quotations omitted). "Simply to assert that the attorney will be called as a witness, a too-frequent trial tactic, is not enough." *Id.* at 607 (quotation omitted).

7. In the State's Objection to Renewed Motion, the State laid out how AG Formella's potential testimony is not necessary, as it would not be relevant, material, and unobtainable elsewhere. Objection to Renewed Motion at ¶¶ 10-17. First, regarding the "origins of the investigation," AG Formella would only be allowed to state that he spoke with Sununu and Ogden before they were interviewed by investigators for the State, which is available through the testimony of Sununu and Ogden. Id. at ¶¶ 12-13. Second, AG Formella would not be allowed to testify to the substance of his conversations with Sununu and Ogden under Rule 801. Id. at ¶ 14. Third, AG Formella would not be allowed to testify to impeach Chief Justice MacDonald regarding the substance of Chief Justice MacDonald's conversation with Sununu because Chief Justice MacDonald would not be allowed to testify to the substance of his conversation with Sununu under Rule 801. Id. at 15. Fourth, Defendant misrepresented the PIU policy in question in her premise on examining AG Formella about the policy, so AG Formella's testimony about the PIU general policy would be unnecessary and quite peripheral to the issues in this matter. Id. at ¶ 16; *Van Dyck*, 149 N.H. at 606. For these reasons, as more fully stated in the Objection to Renewed Motion, AG Formella is not a necessary fact witness in this matter.

Reply: AG Formella Opinion of Opinions of Sununu and/or Ogden

8. In her Reply to the State's Objection to Renewed Motion ("Reply to Objection"), Defendant asserts that she may examine AG Formella with regard to the PIU policy because Sununu and Ogden "denied seeing anything illegal." Reply to Objection at ¶ 12-14. However,

Defendant's argument rests upon the faulty premise that Sununu and/or Ogden's opinions about Defendant's intent or the criminality of Defendant's conduct is admissible at trial.

9. Lay (and even expert) opinion "is not objectionable just because it embraces an ultimate issue." N.H. R. Ev. 704. However, to be admissible, lay opinions must be: "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) [not an expert opinion] within the scope of Rule 702." N.H. R. Ev. 701.

10. A witness's opinion regarding a matter of law is not admissible. *Cyr v. J.I. Case Co.*, 139 N.H. 193, 199 (1994) (citing *Breagy v. Stark*, 138 N.H. 479, 484 (1994); *Saltzman v. Town of Kingston*, 124 N.H. 515, 524-25 (1984)). Similarly, testimony "must be excluded when it involves mixed questions of law and fact." *Breagy*, 138 N.H. at 484 (citing *Saltzman*, 124 N.H. at 524-25). "The result is that a witness may not testify to an opinion or conclusion which contains matters of law. On mixed questions of law and fact the jury . . . can draw the required conclusion from the facts as well as can the expert, so that the opinion of the witness, be he expert or layman, is superfluous in the sense that it will be of no assistance to the jury." *Saltzman*, 124 N.H. at 524-25 (quotation omitted).

11. Accordingly, a witness's opinion about a defendant's intent fails to meet the requirement that a lay opinion be "helpful to clearly understanding the witness's testimony or to determining a fact in issue." *See Cyr v. J.I. Case Co.*, 139 N.H. 193, 201 (1994); *State v. St. Laurent*, 138 N.H. 492, 494-95 (1994). Although such opinion "may [be] rationally based on [the witness's] perception of [Defendant] and [the witness's] personal knowledge of [Defendant], *see* N.H. R. Ev. 602, 701(a), we do not believe [a witness is] in any better position to read [Defendant's] mind . . . than [i]s the jury." *Cyr*, 139 N.H. at 199. *See also St. Laurent*, 138 N.H.

at 494-95 (quoting *State v. Provost*, 490 N.W.2d 93, 101 (Minn. 1992) (expert testimony "on the ultimate issue of whether the defendant in fact formed . . . the requisite intent for the crimes will not aid the jury in its search for truth;" "The jury is capable of deciding the issue of intent without . . . assistance [because] '[j]urors in their everyday lives constantly make judgments on whether the conduct of others was intentional or accidental . . . ;'" "it is the factfinder's responsibility to determine intent, not [an opining witness's] as a thirteenth juror"); *Provost*, 490 N.W.2d at 100-01 (quotations and citations omitted) ("If expert testimony is admissible to negate mens rea, it is also admissible to affirm mens rea. This leads to unprofitable disagreements between the experts hired [or lay witnesses summoned] by both sides. . . . The confusion that would result . . . is not to be underestimated; it is an invitation to semantic jousting, metaphysical speculation and intuitive moral judgments masked as factual determinations."). That is, while this type of testimony may satisfy Rule 701(a), it fails to satisfy Rule 701(b) and should not be admitted.

12. Further, a witness's speculation about what a defendant does or may know (or not know) is also inadmissible. *See Cyr*, 139 N.H. at 199 (witness cannot read Defendant's mind, so cannot testify about contents of Defendant's mind); N.H. R. Ev. 602 (need for personal knowledge); *State v. Craig*, 167 N.H. 361, 379 (2015) (inner workings of person's mind not subject to another's personal knowledge). That is, while a witness may describe a series of interactions, relate observations during an interaction with Defendant, and describe observations of Defendant's behavior (*Cyr*, 139 N.H. at 199), a witness cannot speculate about whether Defendant knew any particular fact or acted with a particular purpose.

13. Thus, not even Sununu and Ogden would properly be able to testify about their opinions about Defendant's intent, their legal opinions, or their speculations about what

Defendant knew or thought. AG Formella's opinion about Sununu and Ogden's opinions would also be inadmissible, as it would be another layer of inadmissible opinion about an inadmissible opinion. Accordingly, AG Formella is not a necessary fact witness under this theory advanced by Defendant.

Reply: Impeachment Evidence

14. In her Reply to Objection, Defendant argues that Formella is a potential impeachment witness for two reasons: (1) Sununu's allegedly inconsistent statements regarding whether he spoke with Chief Justice MacDonald before his meeting with Defendant; and (2) Chief Justice MacDonald allegedly asking Sununu if he had "hear[d] anything." Reply to Objection at ¶ 15.

15. Regarding Sununu's allegedly inconsistent statements, counsel for Defendant misrepresented the substance of these statements to the Court.[1] Defendant accurately states that AG Formella's notes that Sununu told him that Sununu "mentioned [the upcoming meeting with Defendant] to Gordon [MacDonald] beforehand and [MacDonald] didn't know." Id. Defendant then claims that this statement by Sununu is "flatly contradict[ed] [by] Sununu's recorded interviews where he claimed he only spoke to Chief Justice MacDonald afterwards." Id. Defendant makes the following citations, calling them "denials" of the first call by Sununu, to support this claim: "*See* D135 (Sununu first denial); D172 (Sununu second denial)." However, counsel for Defendant's representations of these comments as "denials" is without any basis in fact. The following are the full statements regarding these alleged "denials" for which AG Formella is alleged to be a potential witness to impeach Sununu:

a. "D135 (Sununu first denial)"

[1] The State assumes, without evidence to the contrary, that this misrepresentation was negligent or reckless, as opposed to a knowing violation of N.H. R. Prof. Conduct 3.3 (Candor Toward the Tribunal).

INTERVIEWER: So **after the meeting [with Defendant] concludes, what happened?** Do you reach out to anyone?

GOVERNOR SUNUNU: [Sununu recounts speaking with Ogden] . . . So that's when I said to [Ogden], you know, I'm gonna call Gordon . . . .

D134-35 (emphasis added).

b. "D172 (Sununu second denial)"

INTERVIEWER: All right, thank you all. And so I wanted to go back to the discussion on Justice Hantz Marconi and the meeting. Do you recall, Governor, if there were any calls to Chief Justice prior to the meeting with Justice Hantz Marconi?

GOVERNOR SUNUNU: Yeah, I – I don't, I don't remember having a conversation. It, **it could have happened if Gordon thinks that there was a call I, I have no reason to doubt him**, but **I personally don't remember that call specifically, but it could have happened** I suppose.

INTERVIEWER: Okay, and do you remember having more than one conversation with Chief Justice regarding Justice Hantz Marconi?

GOVERNOR SUNUNU: I, I – **the best I can remember** I, **I know I spoke with him afterwards** and that was very, you know that had a substance in it. I do talk to Gordon from time-to-time so I, again I, **I could have talked to him beforehand. I personally don't remember that but I, like I said, it could have happened.** I, yeah, that's all I can, that's really all I can tell you.

D171-72 (emphasis added).

16. As can be seen from Sununu's statements, Sununu never claims that there was no first phone call with Chief Justice MacDonald. In his first interview, Sununu was asked about whether he spoke with anyone **after** his meeting with Justice Hantz Marconi, and he said that he spoke with Chief Justice MacDonald. After investigators learned from Chief Justice MacDonald about the existence of the first call, Sununu was reinterviewed and explicitly stated that while he did not recall the first call, he had no reason to doubt that there was a first call and it was entirely possible that there was a first call. Accordingly, there is no "denial" – first or second – by Sununu for which AG Formella would be a potential impeachment witness.

17. Further, even if there was a denial of the existence of the first call by Sununu, alternative (and even more compelling) impeachment evidence is available elsewhere: (1) from the statement of Chief Justice MacDonald that there was a first phone call; and (2) from Sununu's telephone records provided in discovery. Sununu's telephone records clearly establish that on the date in question, there were two phone calls from Sununu to Chief Justice MacDonald, one before the time of the meeting, and one after the meeting. *See* D2547-48.

18. First, Sununu never denied the first call happened – he admitted it was possible and he had no reason to doubt it existed, but he simply did not recall its existence independently. Second, to the extent the Court finds that Sununu could be impeached on the existence of the first call, the testimony of Chief Justice MacDonald and Sununu's own telephone records are adequate impeachment evidence for the existence of the first call, and the substance of AG Formella's testimony is thus available elsewhere. Third, to the extent that Defendant does not believe that Chief Justice MacDonald and Sununu's telephone records are adequate impeachment evidence, the State is willing to stipulate to the existence of the first phone call based on Sununu's telephone records, which would render AG Formella's testimony

unnecessary. Accordingly, AG Formella is not a potential impeachment witness regarding the existence of the first call.

19. Regarding Chief Justice MacDonald asking Sununu if he "hear[d] anything," again, the substance of the conversation between Chief Justice MacDonald and Sununu is inadmissible hearsay. Objection to Renewed Motion at ¶ 15. To the extent Defendant seeks to admit this alleged hearsay statement from AG Formella in order to solicit an opinion from AG Formella about the propriety or impropriety of this alleged statement by Chief Justice MacDonald, such an opinion would be improper. *See* ¶¶ 9-12, *supra*. Further, any potential impropriety of this alleged statement by Chief Justice MacDonald would be subject to Rule 404(b) motion, and Defendant has not filed a Rule 404(b) motion to admit this evidence. However, the State would note that the reasons proffered by Defendant in her Reply to Objection do not meet the standard for Rule 404(b)(1) (reasons for admission) or 404(b)(2)(B) (clear proof).

WHEREFORE, the State of New Hampshire respectfully requests that this Honorable Court:

(A) Quash the subpoena served on AG Formella; and

(B) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: July 25, 2025

Joe M. Fincham II
Joe M. Fincham II, Bar #273596
Assistant Attorney General

Criminal Justice Bureau
New Hampshire Department of Justice
1 Granite Place South
Concord, NH 03301
(603) 271-3671
joe.m.finchamii@doj.nh.gov

Dan A. Jiménez
Dan A. Jimenez, Bar #273604
Senior Assistant Attorney General
Criminal Justice Bureau
New Hampshire Department of Justice
1 Granite Place South
Concord, NH 03301
(603) 271-3671
dan.a.jimenez@doj.nh.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent via the Court's e-filing system to counsel of record.

/s/ Joe M. Fincham II
Joe M. Fincham II